

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation into the Operations and Practices of
Qwest Communications Corporation, et al.
Concerning Compliance with Statutes,
Commission Decisions, and Other Requirements
Applicable to the Utility's Installation of Facilities
in California for Providing Telecommunications
Service.

Investigation 00-03-001
(Filed March 2, 2000)

**ADMINISTRATIVE LAW JUDGE'S RULING SUSPENDING DUE DATE FOR
TESTIMONY AND CONVENING PREHEARING CONFERENCE**

[The following is the text of a ruling that ALJ McKenzie e-mailed to the parties on the evening of July 12, 2004.]

This ruling is issued in connection with a series of motions filed on June 29, 2004 by respondent Qwest Communications Corporation (Qwest). The motions seek various forms of relief in connection with the procedural schedule established for this proceeding at the prehearing conference (PHC) held on March 10, 2004. The four consist of Qwest's motions to (1) dismiss the investigation, (2) refer the proceeding to mediation, (3) prepare a final scoping memorandum, and (4) vacate the procedural schedule. This ruling concerns the last of these four motions.¹

As explained below, while I do not believe that the procedural schedule worked out at the March 10 PHC should be entirely vacated while the motions

¹ On July 8, 2004, Qwest also filed a motion seeking an order to compel the Consumer Protection and Safety Division (CPSD) to answer Qwest's first set of data requests.

Qwest filed on June 29 are being considered, competing demands on the time of Qwest's lead counsel make it appropriate to extend the submission date for Qwest's opening testimony, which is currently due on July 16, 2004. To help determine when this testimony should be due, an additional PHC will be held in this proceeding on July 29, 2004.

Procedural Background

The motions described above are lengthy, and in several cases are supported by declarations with extensive exhibits. However, under Rule 45(f) of the Commission's Rules of Practice and Procedure, responses to all four of the motions would normally be due on July 14, 2004.

On July 7, 2004, counsel for CPSD sent the undersigned an e-mail message (which was served on all parties) requesting an extension of time until July 26, 2004 to respond to the first three of the motions, and representing that Qwest's counsel did not object to such an extension. With respect to the fourth motion – *i.e.*, that seeking to vacate the procedural schedule -- CPSD counsel proposed to respond by the July 14th due date.

On July 8, 2004, I sent an e-mail to all parties granting the extension of time requested by CPSD's counsel. However, I also directed CPSD to file its response to the motion to vacate the procedural schedule no later than July 9, 2004.

Qwest's Contentions

In its motion to vacate the procedural schedule, Qwest urges four principal grounds for granting such relief. First, Qwest argues that the current procedural schedule (which calls for Qwest to submit opening testimony on its authority to construct facilities on July 16) should be vacated to give the undersigned and the Assigned Commissioner time to consider and rule upon the motions to dismiss the proceeding, to prepare a final scoping memo, and to refer this matter to mediation.

Second, Qwest argues that it is uncertain as to the scope of the investigation, an uncertainty allegedly exacerbated by CPSD's refusal to answer the data requests that are now the subject of a motion to compel. On this question, Qwest states:

“[U]ntil the scope of the proceeding, the issues to be addressed, and the nature of the bifurcation of the hearing process are all clarified in a Scoping Memo, Qwest is unable to prepare its initial testimony because it does not know what that testimony is supposed to address – a fact compounded by CPSD's recent refusal to respond to Qwest's data request . . .” (Qwest Motion to Vacate Schedule, p. 2.)

Third, and apparently as an alternative to the second ground, Qwest suggests that it understands what the testimony due on July 16 is supposed to address, but argues that it would be “wasteful, if not unfair” to require the submission of such testimony, because the Commission might grant some or all of the relief requested in the other motions, including ordering this proceeding to mediation.

Finally, Qwest notes that it has recently substituted new counsel in this proceeding, and that he has recently been engaged in “back-to-back evidentiary hearings” in Application (A.) 02-05-046 and Investigation (I.) 02-11-040. Under these circumstances, Qwest asserts, “requiring the preparation and service of testimony [on July 16] without the full and effective participation of [Qwest's] lead counsel would adversely affect its ability to present its case.” (*Id.* at 3.)

CPSD's Contentions

In its July 9 response, CPSD opposes Qwest's motion to vacate the procedural schedule. CPSD's principal ground for doing so is that because the Phase I testimony due on July 16 deals only with Qwest's authority to construct facilities, Qwest has no need for discovery responses from CPSD in order to prepare that testimony. CPSD acknowledges that discovery as to the scope of

damage (if any) caused by Qwest's construction is relevant to Phase II of this proceeding (as delineated at the March 10 PHC), but argues that the expert assessments needed to answer such discovery requests will be available by the time the issue of Qwest's authority to construct is resolved. (CPSD Response, pp. 2-4.)

CPSD also argues strenuously that Qwest's substitution of new counsel is not an adequate ground for postponing the due date for testimony. Noting that when Steefel, Levitt & Weiss substituted as lead counsel for Qwest on April 1, "the Phase I hearings were still nearly six months away," CPSD argues that Qwest's claim the current schedule places an undue burden on it "is simply not supported by the facts or the record." (*Id.* at 2.) Moreover, CPSD continues, Qwest's in-house counsel (who continues to be co-counsel in this proceeding) was present at the March 10 PHC and raised no objection to the two-phase approach, which he appeared to understand fully. Thus, CPSD argues, it "cannot understand how Qwest counsel can, in good faith, continue to insist that they have no idea what this case is about." (*Id.* at 4-5.)

Finally, CPSD argues that the sense of urgency that pervades Qwest's motion to vacate the procedural schedule is the result of waiting to file the motion until June 29, only a bit more than two weeks before the July 16th due date for testimony. CPSD maintains that Qwest should not be rewarded for its tardiness by being granted the relief requested in the motion. (*Id.* at 5-6.)

Discussion

Although, as CPSD rightly points out, many of the claims in Qwest's motion to vacate the procedural schedule are exaggerated, the recent substitution of Mark Fogelman as new lead counsel for Qwest in this case -- coupled with the fact that Mr. Fogelman has been in back-to-back hearings in either A.02-05-046 or I.02-11-040 since June 4, 2004 -- justify an extension of the due date for Qwest's

Phase I testimony. I have also concluded that, for the purpose of setting the new due date for testimony, an additional PHC should be held in this proceeding.

However, since I continue to believe that the phasing approach laid out at the March 10 PHC is an appropriate one for resolving this case – with the first phase devoted to the issue of Qwest’s authority to construct, and the second phase devoted to what penalties are appropriate if Qwest is found to have lacked construction authority -- I am not prepared to vacate the procedural schedule until the motions filed by Qwest on June 29th are resolved. To the contrary, at the PHC to be held on July 29, 2004, Qwest will have a heavy burden to persuade me that the phasing approach is not appropriate, and that it should be granted anything more than an extension of time to file its Phase I testimony on account of the above-noted schedule constraints of its new lead counsel.

As CPSD notes in its July 9th response, the claim in Qwest’s motion that it cannot prepare the testimony due on July 16th because it cannot know what it is supposed to address until “the issues to be addressed[] and the nature of the bifurcation of the hearing process are all clarified in a Scoping memo,” simply begs credulity. During the March 10, 2004 PHC, I gave the following explanation of how this proceeding would be handled in two phases:

“So I think in the first phase of this proceeding we ought to litigate those issues, the subject matter jurisdiction defense [based on D.94-07-028²] . . . and then the issue of whether [Qwest] could

² Earlier at the PHC, I made another statement about the lack-of-subject-matter-jurisdiction defense based on *Phoenix FiberLink v. Electric Lightwave*, Decision (D.) 94-07-028 (55 CPUC2d 344), a defense that Qwest had raised for the first time in its March 8, 2004 PHC statement. I noted that in the first phase, “Qwest would put in whatever case it can offer in support of its contention that the Commission doesn’t have subject matter jurisdiction of this because . . . [Qwest] constructed under authority granted to it by the Federal Communications Commission, and the California Public Utilities Commission can’t question that.” (Tr. 129.) Interestingly, none of the motions filed by Qwest on

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demonstrate that you had authority to construct under the CPCN first granted to Southern Pacific [in D.93-10-018] . . .

“In the event the conclusion coming out of Phase I is you haven’t shown authority to construct and therefore there is liability on Qwest’s part, in a second phase we would move to the issue of what are the appropriate penalties for that. And in that second phase, if we get to a penalty phase, then the question of whether there was reasonable reliance by Qwest on advice it got from Commission staff is an appropriate subject for inquiry.” (Tr., p. 132.)

Even though Qwest’s claims of ambiguity in the description of the phasing approach are far-fetched, its assertions that it may be prejudiced in the preparation of its Phase I testimony by the limited availability of its new lead counsel, Mr. Fogelman, are not. As Qwest notes in its motion, Mr. Fogelman is serving as counsel to the Navajo Nation in A.02-05-046, the Mohave Generating Station proceeding, and also as counsel to Pacific Gas & Electric Company in I.02-11-040, the Gas Price Spikes investigation. Evidentiary hearings in the Mohave matter began on June 4 and ended on July 9, and I am informed that Mr. Fogelman was absent from the hearing room on only one of the 16 hearing days. Mr. Fogelman is also expected to be fully occupied during the week of evidentiary hearings that are scheduled in I.02-11-040 from July 12th through July 16th. While other lawyers in Mr. Fogelman’s office are also working on the Qwest proceeding, it is not difficult to credit Qwest’s assertion that Mr. Fogelman’s other hearing commitments preclude his “full and effective participation” in the preparation of Phase I testimony, or that his limited availability may “adversely

June 29, 2004 appear to make any mention of a subject matter jurisdiction defense based on *Phoenix FiberLink v. Electric Lightwave*.

impact [Qwest's] ability to present its case." (Qwest Motion to Vacate Schedule, p. 3.)³

For the reasons set forth above, **IT IS RULED** that:

1. The July 16, 2004 due date for the opening testimony of Qwest Communications Corporation in Phase I of this proceeding, as delineated at the prehearing conference (PHC) held on March 10, 2004, is hereby suspended, pending a further ruling by the undersigned.

2. The other due dates for testimony and hearings specified at the March 10, 2004 PHC are also suspended, pending a further ruling by the undersigned.

3. An additional PHC in this proceeding will be held on Thursday, July 29, 2004, beginning at 10 a.m. in the Commission Courtroom, State Office Building, 505 Van Ness Avenue, San Francisco, California.

4. At the PHC on July 29, 2004, the undersigned may set new due dates for testimony and hearings in this proceeding, as well as issue rulings on other matters.

Dated July 14, 2004, at San Francisco, California.

/s/ A. KIRK McKENZIE

A. Kirk McKenzie
Administrative Law Judge

³ CPSPD's response that Qwest's in-house lawyer, Matt Middlebrooks, can adequately handle the preparation of Qwest's Phase I opening testimony because he was present at the March 10 PHC, rings hollow.

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Suspending Due Date for Testimony and Convening Prehearing Conference on all parties of record in this proceeding or their attorneys of record.

Dated July 14, 2004, at San Francisco, California.

/s/ KE HUANG

Ke Huang

N O T I C E

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